




FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**MEMORANDUM**

**TO:** The Commission  
Acting Staff Director  
Acting General Counsel

**FROM:** Office of the Commission Secretary 

**DATE:** March 16, 2011

**SUBJECT:** Concurring Statement for  
Advisory Opinion 2011-01  
(Robin Carnahan for Senate)

Transmitted herewith is the Concurring Statement from Vice Chair  
Caroline C. Hunter and Commissioners Donald F. McGahn II and  
Matthew S. Petersen.

Attachment



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**ADVISORY OPINION 2011-01**  
**(Robin Carnahan for Senate)**

**CONCURRING STATEMENT OF**  
**VICE CHAIR CAROLINE C. HUNTER, and**  
**COMMISSIONERS DONALD F. McGAHN and MATTHEW S. PETERSEN**

On February 17, 2011, the Commission unanimously approved Advisory Opinion 2011-01, confirming that the Federal Election Campaign Act (the "Act") and Commission regulations permit the establishment of a legal defense fund as described by Robin Carnahan's principal campaign committee ("the Requestor"), and that the donations received by such a fund were not subject to source prohibitions, amount limitations, or reporting requirements, because the amounts received and disbursed by the legal defense fund would not be "contributions" or "expenditures" under the Act. We voted for this Advisory Opinion but write separately to make clear that, as discussed at the Commission's February 17 open meeting<sup>1</sup> and the request in this advisory opinion,<sup>2</sup> the legal defense fund at issue is not in connection with any election. Thus, the outcome in this Advisory Opinion did not hinge on the fact that Carnahan lost her election and, hence, is no longer a Federal officeholder or a Federal candidate.

The Commission addressed the applicability of the Act to legal defense funds in Advisory Opinion 2003-15 (Majette). There, the Commission determined, by a vote of 5-0,<sup>3</sup> that Denise Majette, a Federal officeholder, was permitted to establish and solicit for a legal defense fund, without regard to the Act's source prohibitions, amount limitations and reporting requirements, to defray legal expenses connected to a lawsuit filed against her by supporters of her primary opponent.<sup>4</sup> In that lawsuit, the plaintiffs sought first to enjoin state officials from holding a general election in her district and then, after the general election, sought a special primary and general election.

Here, Requestor sought to establish a legal defense fund to defend against a copyright infringement and misappropriation lawsuit arising from an advertisement run by the committee. We see no material differences between the circumstances in Advisory Opinion 2003-15 and those here. In fact, if a lawsuit seeking to overturn election results is not in connection with an

<sup>1</sup> An audio recording of those deliberations is available at <http://www.fec.gov/agenda/2011/agenda20110217.shtml>.

<sup>2</sup> Available at <http://saos.nictusa.com/saos/searchno?SUBMIT=no&AO=3147&START=1160751.pdf>.

<sup>3</sup> Advisory Opinion 2003-15 (Majette) Certification.

<sup>4</sup> Advisory Opinion 2003-15 at 4. See also *id.* at 3-4 ("In prior advisory opinions, the Commission has concluded that the limits and prohibitions of the Act do not apply to monies given to a candidate's legal defense fund.") (citing Advisory Opinions 1996-39, 1983-21, and 1981-13).

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Concurring Statement of Vice Chair Hunter and Commissioners McGahn and Petersen

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election, then a lawsuit alleging copyright infringement and misappropriation certainly is not, even if the alleged violation arose in a campaign communication. Therefore, like the lawsuit in Advisory Opinion 2003-15, this lawsuit is not "in connection with" a federal election, and section 441i(e) does not apply to any funds solicited for or spent by the legal defense fund in question. Even though Ms. Carnahan, unlike former Congresswoman Majette, was not a Federal candidate at the time she made her Advisory Opinion request, that is an immaterial distinction because activities that are not "in connection with" a Federal election are beyond the Commission's jurisdiction.<sup>5</sup> Thus, Carnahan fully enjoys the protections of Advisory Opinion 2003-15.<sup>6</sup>

  
CAROLINE C. HUNTER  
Vice Chair

3/16/11  
Date

  
DONALD F. MCGAHN II  
Commissioner

3/16/11  
Date

  
MATTHEW S. PETERSEN  
Commissioner

3/16/11  
Date

<sup>5</sup> We note that Requestor has made no representation as to whether Federal officeholders or candidates will be involved in the solicitation of funds for Ms. Carnahan's legal defense fund. We believe that the Commission, in Advisory Opinion 2003-15, has already stated that nothing in the Act, including 2 U.S.C. § 441i(e), prohibits Federal officeholders and candidates from doing so.

<sup>6</sup> "Any advisory opinion rendered by the Commission under [2 U.S.C. §437f(a)] may be relied upon by... any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." 2 U.S.C. §427f(c).